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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

# No. 605

WILMOT W. TREW,

*Petitioner,*

*vs.*

DAN E. GARVEY, AS SECRETARY OF STATE OF THE STATE OF ARIZONA

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

May it please the court:

The petition of Wilmot W. Trew of Phoenix, Arizona respectfully shows:

I

**Record**

That this petition for Writ of Certiorari is accompanied by a certified transcript of the record in the case, including the proceedings in the Supreme Court of the State of Arizona, to which court the Writ is asked to be directed.

## II

### Summary

The First Special Session of the 17th Legislature of the State of Arizona in 1945 enacted Chapter 11, House Bill 20 as an ordinary measure, not as an emergency measure. The measure was approved by the Governor of Arizona on the 3d day of October, 1945. (Opinion, Tr. 42)

"Within the time provided by the Constitution for the filing of referendum petitions, there were filed with the secretary of state petitions signed by the requisite number of qualified electors." (Opinion, Tr. 43) ordering House Bill 20, entitled:

> "Chapter 11, House Bill No. 20, an act relating to public utilities; providing for the establishment of a rate-making base for public service corporations furnishing gas and electricity; providing for the cooperation of the Federal Power Commission, and making an appropriation."

referred to a vote of the qualified electors of Arizona for their approval or rejection at the polls at the next regular general election.

Garvey, the secretary of state, issued his official receipt for said referendum petitions, showing them to have been filed by him at 3:15 P. M. on December 26, 1945 (Tr. 7-8).

On January 4, 1946 Garvey, in his official capacity as secretary of state, wrote the proponent of said referendum petitions, saying, "Upon the advice of the attorney general, I have come to the conclusion that Chapter 11, House Bill No. 20, cannot be referred to a vote of the people because it is for the support and maintenance of the Corporation Commission, a department of the state government created by the Constitution of Arizona, in the discharge of its constitutional duties. Accordingly I decline to file * * *

the said petitions * * *. In my judgment the referendum petition is ineffective for all purposes and I will not recognize it as valid unless ordered to do so by a court of competent jurisdiction." (Tr. 9)

Petitioner Trew, as plaintiff, commenced an action against Dan E. Garvey, as Secretary of State of the State of Arizona, in the Superior Court of Maricopa County, Arizona on the 11th day of January, 1946 for the *sole and only* purpose of compelling Garvey, as secretary of state, to file as of December 26, 1945 the referendum petitions, or, in the alternative, for a declaratory judgment, decreeing that he had filed them in his office on the 26th day of December, 1945. *No other or additional relief was sought by the action,* (Tr. 1-11) *or authorized by Sec. 60-105, Arizona Code 1939.*

"Upon the complaint and application of appellee, as plaintiff, an alternative writ of mandamus was issued by the superior court, requiring the appellant, the defendant, to file the referendum petition or show cause for failure to do so." Upon issue joined and after hearing the writ was made permanent. From the final order and judgment of the court, the defendant appealed." (Tr. 43)

The Supreme Court of Arizona on the 28th day of June, 1946 filed its opinion and, in accordance therewith, ordered the judgment of the trial court in the cause reversed, and directed the entry of judgment for Garvey, as secretary of state (Tr. 41-2).

Seasonably, Petitioner Trew filed his motion for a rehearing in said Supreme Court of Arizona and on July 12, 1946 said court denied said motion for rehearing (Tr. 41).

## III

### Short Statement of Matters Involved

1. The jurisdiction and power of the judicial branch of the government of Arizona, acting through the Supreme Court of Arizona, the court of last resort:

(a) To stop the people of Arizona from proceeding to exercise, at their own option, their reserved power under Article 4, Part 1, Section 3 of the Constitution of Arizona to approve or reject at the polls any act of the Arizona legislature;

(b) To construe the Arizona statute, Sec. 60-105, Arizona Code 1939, and the Arizona Constitution, Article 4, Part 1, Section 3, so as to arrogate to itself the power to declare an act unconstitutional before the legislative department of the state government has enacted it and while the passage of the act is being considered; and so as to render said statute and Constitution repugnant to the Constitution of the United States and to the Enabling Act, approved June 20, 1910, (36 Stat., 557-572), under which Enabling Act Arizona was admitted to statehood; and so as to destroy the republican form of government in Arizona, mandatorily required to be maintained by said Enabling Act and the Constitution of the United States;

(c) To take from the qualified electors of Arizona their reserved power under Article 4, Part 1, Section 3 of the Constitution of Arizona, by the use of the referendum, to review and approve or reject any act passed by the Arizona legislature as an ordinary act and not as an emergency act to provide appropriations for the support and maintenance of the departments of the state and all state institutions;

(d) To prevent the legislative branch of the state government of Arizona from functioning;

(e) To construe the Constitution of Arizona so as to render it repugnant to the Constitution of the United States, the Arizona Enabling Act, and so as to destroy the republican form of government in Arizona; and

(f) To decide constitutional issues not involved in the pleadings and unauthorized by Sec. 60-105, Arizona Code 1939, or in the case, so as to stop the people of Arizona actually engaged therein from exercising, at their own option, their reserved power under Article 4, Part 1, Section 3 of the Arizona Constitution to review and approve or reject, at the polls, any act of the Arizona legislature.

2. The jurisdiction of the Supreme Court of Arizona to affirm the action of the secretary of state, a mere ministerial officer, in abridging the privileges of Petitioner and the people of Arizona—citizens of the United States, of using their reserved power, at their option, at the polls, to approve or reject an act of the Arizona legislature, by deciding that the act was not one that might be referred to a vote of the people at the polls, by the use of the referendum, and thus depriving them of their property without due process of law by subjecting their property to taxation under an act never finally passed by the legislative department of the government of Arizona.

3. The jurisdiction of the Supreme Court of Arizona to construe Sec. 60-105, Arizona Code 1939, and Article 4, Part 1, Section 3 of the Constitution of Arizona so as to give to the secretary of state, a mere ministerial officer, the power and authority:

(a) To judge and decide the meaning and application of said statute and constitutional provision and, by such

decision, to stop the people of Arizona from continuing in the exercise of their reserved power, at their option, to approve or reject, at the polls, any act of the Arizona legislature;

(b) To disregard the meaning and effect of said statute and constitutional provision as theretofore interpreted and declared by the court of last resort in Arizona; and

(c) To disregard the declared meaning of the laws of Arizona by the court of last resort and, by so disregarding the declared meaning of the laws of Arizona, to compel interested citizens and electors, each time they, at their option, elect by the use of the referendum, at the polls, to approve or reject any act of the Arizona legislature, to resort again to the courts for another declaration of the meaning of said statute and constitutional provision by the court of last resort, and to compel the performance by the secretary of state of a mere ministerial duty, necessary to be performed to enable the people to exercise their said reserved power.

4. The jurisdiction and power of the Supreme Court of Arizona in an action commenced under Sec. 60-105, Arizona Code 1939, *only* to direct the filing of referendum petitions, or, in the alternative, under Article 7, Sections 27-701-6, Arizona Code 1939, *only* to enter a declaratory judgment that referendum petitions had been filed, to decide constitutional questions not embraced in the pleadings or in the case, so as to deprive Petitioner and all taxpayers in Arizona of their property without due process of law by subjecting their property to taxation under a law never finally enacted, and so as to abridge the people's right under their reserved power, Article 4, Part 1, Section 3 of the Constitution of Arizona, at their option, to review

and approve or reject, at the polls, any act of the Arizona legislature.

## IV

### Reasons Relied upon for the Allowance of the Writ

The reasons relied upon by Petitioner for the allowance of the writ sought are:

First: No court has ever had jurisdiction to stop legislative bodies from legislating. Jurisdiction attaches after legislation, not before legislation, and not during the process of legislation. It is only after an act has been finally enacted that the courts have jurisdiction to determine its constitutionality. Therefore, the Supreme Court of Arizona exceeded its jurisdiction in stopping a part of the legislative branch of the government or Arizona, viz: the electorate, from functioning while engaged in the process of legislation and before it has completed the passage of the law, either by approving or rejecting the act of the legislature, the other part of the legislative department of the state government.

Second: Because the decision of the Supreme Court of Arizona stops the qualified electors of Arizona (they being a part of the legislative branch of the government of Arizona) from reviewing, by the use of the referendum, and approving or rejecting at the polls an act of the legislature.

Third: Because the decision of the Supreme Court of Arizona prevents the exercise by the legislative branch of the government of Arizona of powers properly belonging exclusively to it.

Fourth: Because the decision of the Supreme Court of Arizona construes an Arizona statute and the Constitution of Arizona so as to render the statute and Constitution

repugnant to the Constitution of the United States and repugnant to Section 20 of the Enabling Act (36 Stat., 557-572), under which Enabling Act Arizona was admitted to statehood.

Fifth: Because the decision of the Supreme Court of Arizona destroys the republican form of government in Arizona.

Sixth: Because the decision of the Supreme Court of Arizona abridges the privileges of petitioner and the qualified electors of Arizona, who are citizens of the United States, of exercising the reserved powers granted to them by Article 4, Part 1, Section 3 of the Constitution of Arizona, and deprives Petitioner and all taxpayers of Arizona of their property through taxation without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Seventh: Because the questions decided by the Supreme Court of Arizona are outside of any issues embodied in the pleadings, or in the case.

Eighth: Because the only power and authority within the jurisdiction of the Supreme Court of the State of Arizona under Sec. 60-105, Arizona Code 1939, is to compel the secretary of state to file the referendum petitions, where, as here, the Supreme Court of Arizona finds that

> "within the time provided by the Constitution for the filing of referendum petitions, there were filed with the secretary of state petitions signed by the requisite number of qualified electors." (Opinion, Tr. 43.)

Ninth: Because the decision of the Supreme Court of Arizona confirms authority in the secretary of state, a mere ministerial officer, to judge and decide the meaning and application of the Arizona Constitution.

Tenth: Because the decision of the Supreme Court of Arizona authorizes the secretary of state, a mere ministerial officer, to disregard the construction of the Constitution by the court of last resort in Arizona.

Eleventh: Because the decision of the Supreme Court of Arizona approves the refusal of the secretary of state, a mere ministerial officer, to perform ministerial duties, clearly defined by the decisions of the court of last resort in Arizona.

Twelfth: Because the decision of the Supreme Court of Arizona gives to the secretary of state, a mere ministerial officer, jurisdiction, power and authority to refuse to recognize the law as interpreted and declared by the court of last resort—power and authority denied to all inferior courts, which are bound in their decisions to follow the law as adjudicated by such court.

Thirteenth: Because the decision of the Supreme Court of Arizona sanctions the disregard by the secretary of state of the meaning of the law, constitutional and statutory, as established by the decisions of the court of last resort, and in so doing enables the secretary of state to force citizens, electors and taxpayers to resort to the courts again and again to compel the performance of mere ministerial duties.

Wherefore, petitioner respectfully asks that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Arizona, commanding said court to certify and send to this court a full and complete transcript of the record of the case and all proceedings in the Supreme Court of the State of Arizona in the case numbered and entitled on its docket No. 4889, Dan E. Garvey, as Secretary of State of the State of Arizona, appellant, *v.* Wilmot W. Trew, appellee, to the end

that this cause may be reviewed and determined by this court, as provided by the Statutes of the United States, and that the judgment of said Supreme Court of the State of Arizona be reversed by this court; and your petitioner asks that the certified transcript of the record of the case and the proceedings in the Supreme Court of the State of Arizona filed with this petition may be treated as a return to said Writ of Certiorari, and your petitioner asks that he may have such other and further remedies in the premises as to this court may seem appropriate and in conformity with law.

WILMONT W. TREW,
*Petitioner.*
HENDERSON STOCKTON,
*Counsel for Petitioner.*
S. N. KARAM,
LAURENS L. HENDERSON,
*of Counsel for Petitioner.*

STATE OF ARIZONA,
County of Maricopa, ss:

HENDERSON STOCKTON, being upon his oath first duly sworn, deposes and says: that he is counsel for petitioner in the above and foregoing Petition for Writ of Certiorari and that, in his opinion, the said above and foregoing petition is well founded; and that said above and foregoing petition is not interposed for delay.

HENDERSON STOCKTON.

Subscribed and sworn to before me this 2d day of October, 1946.

THELMA S. MILLS,
*Notary Public.*

My commission expires June 19, 1950. (Seal.)

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I

### Opinion Below

The opinion of the Supreme Court of Arizona is reported in 170 P. 2d, 845, and appears in the Transcript of Record at pages 42 to 57.

### II

### Jurisdiction

1. Jurisdiction to grant certiorari is conferred by Sec. 237(b), Judicial Code, 28 U. S. C. A., Sec. 344(b).

The date of the judgment to be reviewed is June 28, 1946 (Tr. 41) and the date of denial of motion for rehearing is July 12, 1946 (Tr. 41).

2. The specific claims advanced, and rulings made in the lower court which are relied upon as the basis of this Court's jurisdiction, are as follows:

Petitioner contended in the court below that the people, at the polls, had the right by the use of the referendum to review the act of the legislature and approve or reject it; that neither the secretary of state nor the court had jurisdiction to assume in advance of the action of the people the power or right to determine whether a proposed measure was valid or invalid, or whether an act of the legislature was one that might be referred to a vote of the people by the use of the referendum; that the only jurisdiction, power or authority possessed by the secretary of state or the court was to determine if the referendum petition was legally sufficient and if the referendum petition was found legally sufficient, under Sec. 60-105, Arizona Code 1939 it was the plain duty of the secretary of state to file it, and

the court, under said section, had no jurisdiction, power or authority to do more than compel the secretary of state to file the referendum petition, or under Article 7, Sec. 27-701-6, Arizona Code 1939 to enter a declaratory judgment that the referendum petition had been filed by the secretary of state.

These contentions of petitioner were rejected by the court.

The court went outside of and beyond the issues framed by the pleadings in the case (Tr. 1-11) and acted without and in excess of its jurisdiction in decreeing in advance that the act of the legislature was not one that might be referred by the use of the referendum for approval or rejection at the polls by the people (Tr. 42-57, Opinion), upon the ground that the act was an appropriation measure for the support and maintenance of a department of state (Tr. 46, Opinion), and that such an act was not referrable by the use of the referendum, although the act was passed only as an ordinary law and not as an emergency act (Tr. 54, Opinion).

The decision of the Supreme Court of Arizona abridges the privileges of the people of Arizona, citizens of the United States, to legislate, and deprives petitioner, the electors and taxpayers of Arizona, of their property without due process of law by subjecting it to taxation under a law never finally enacted, all in violation of the 14th Amendment to the Constitution of the United States.

The decision of the Supreme Court of Arizona gives to Sec. 60-105, Arizona Code 1939, and Article 4, Part 1, Section 3 of the Arizona Constitution a meaning rendering both repugnant to the Constitution of the United States and Sec. 20 of the Enabling Act (36 Stat. 557-572), and a meaning which destroys the republican form of government in Arizona by stopping the legislative department of the gov-

ernment of Arizona from functioning while it was proceeding to legislate.

The decision of the Supreme Court of Arizona reversed a former decision holding to the contrary and confirmed in the secretary of state, a mere ministerial officer, the jurisdiction, power and authority, withheld from every inferior court in Arizona, to disregard the meaning of Sec. 60-105, Arizona Code 1939, and Article 4, Part 1, Section 3 of the Arizona Constitution, as declared by the court of last resort.

3. The statutory provisions under which the jurisdiction of the court is invoked are Sec. 237(b), Judicial Code, 28 U. S. C. A., Sec. 344(b).

4. The cases believed to sustain the jurisdiction are:

*Commonwealth of Massachusetts* v. *Mellon*, 262 U. S. 447, 67 L. Ed. 1078;
*State* v. *Osborn*, 16 Ariz. 247, 143 P. 117;
*Martin* v. *Hunter's Lessee*, 14 U. S. 304, 1 Wheat. 304, 4 L. Ed. 97.

## III

### Statement of the Case

A full statement of the case has been made in the petition for certiorari under the heading, "II. Summary", and in the interest of brevity the statement is not here repeated. (See pages 11 to 26 of petition for certiorari, made a part hereof.)

## IV

### Specification of Errors

1. The court erred in ascribing a meaning to Sec. 60-105, Arizona Code, 1939, and Article 4, Part 1, Section 3 of the Arizona Constitution which (a) renders both repugnant

to the Constitution of the United States and the Enabling Act, pursuant to which Arizona was admitted to statehood; (b) destroys the republican form of government in Arizona; (c) abridges the privileges of petitioner and the people of Arizona—citizens of the United States, of using their reserved power, at their option, at the polls, to approve or reject an act of the Arizona legislature; and (d) deprives petitioner and all taxpayers of Arizona of their property without due process of law by subjecting their property to taxation under an act never finally passed by the legislative department of the government of Arizona, because the effect of the decision is to deprive one branch of the legislative department, *i. e.*, the people of the state, from legislating and stops them in the act of legislating, and because the effect of the decision approves the taxation of the property of petitioner and other property owners in Arizona under a law never finally enacted.

The assumption of power to pass upon the validity or constitutionality of an act of the legislative department before the enactment is complete destroys the republican form of government, for free legislation by the legislative department of a state is indispensable to the maintenance of the republican form of government.

2. The Supreme Court of Arizona erred in not directing the secretary of state to file the referendum petitions, or in failing to enter a declaratory judgment that the referendum petitions had been filed, for the following reasons:

(a) Because the jurisdiction of the court under Sec. 60-105, Arizona Code, 1939, is limited to the sole issue of whether or not the referendum petitions were legally sufficient (conformed with the requirements of the law as to form and signature) and, if found legally sufficient, to direct the filing thereof, or to enter a declaratory judgment that the referendum petitions had been filed;

(b) Because the only issue in the pleadings and in the case was whether the referendum petitions were legally sufficient (conformed to the requirements of the law as to form and signature). If found legally sufficient, the jurisdiction of the court was limited to directing that they be filed, or, in the alternative, decreeing that they had been filed; and

(c) Because the court determined that the referendum petitions were legally sufficient, viz., that they conformed with the requirements of the law as to form and signature.

3. The court erred in sanctioning the assumption of jurisdiction, power and authority by the secretary of state:

(a) To disregard the meaning of the law, constitutional and statutory, as established by the decisions of the court of last resort;

(b) To himself interpret the statutory and constitutional provisions contrary to their declared meaning by the court of last resort; and

(c) To stop a part of the legislative department, viz., the people, from legislating, and forcing the people, qualified electors and taxpayers, to resort to the courts to compel the performance of a mere ministerial duty.

The error is apparent because the secretary of state is a ministerial officer and if referendum petitions legally sufficient (conforming with the requirements of the law as to form and signature) are presented to him, it is his plain duty to file them. He is without jurisdiction, power or authority to determine the constitutionality of any act, or if any act may be referred, by the use of the referendum, to a vote of the people.

4. The court erred in assuming the jurisdiction, power and right in advance of the final enactment of a law by a

part of the legislative department of the state, viz., the people, to decide whether the act sought to be referred by the use of the referendum to a vote of the people was valid or invalid, or was an act that might or might not be so referred, thereby stopping such part of the legislative department from legislating while they were actually engaged in the process of legislation.

The error plainly appears because the courts are without jurisdiction to stop legislative bodies from legislating. The jurisdiction of the court attaches only after legislation, not before legislation, and not during the process of legislation. It is then and then only (after an act has been finally enacted) that the court has jurisdiction to determine its constitutionality and validity. Furthermore, the only relief sought by petitioner was a judgment to compel the secretary of state to file the referendum petitions, or a declaratory judgment that they had been filed. No other issues were in the pleadings, or in the case.

The court's decision went outside of the issues and the court acted without and in excess of its jurisdiction.

## Brief of Argument

The decision of the court below abridges the privileges of the people of Arizona and petitioner of the use of their reserved power, at their option, at the polls to approve or reject an act of the legislature, and deprives petitioner and all taxpayers of Arizona of their property without due process of law.

The people of Arizona are a part of its legislative body. The decision of the court below, by ascribing a meaning to the applicable constitutional and statutory provisions that stops the people from legislating by the use of the referendum, not only renders both repugnant to the Constitution of the United States and to the Enabling Act, under

which Arizona was admitted to statehood, but destroys the republican form of government in Arizona.

The court below was without jurisdiction in sanctioning the acts of the secretary of state which stopped the people from legislating. It is only after legislation, not before legislation, and not during the process of legislation, that a court has jurisdiction to determine the validity of a law, or if an act of the legislature may be referred to a vote of the people by the use of the referendum.

The secretary of state and the court below had jurisdiction only to determine the legal sufficiency of the referendum petitions (whether they conformed with the requirements of law as to form and signature). Finding the referendum petitions legally sufficient, the jurisdiction of the court below was limited to ordering them filed.

## V

## Argument

For conciseness, the specified errors will be treated together.

Section 20 of the Enabling Act (36 Stat. 557-572) among other things provides:

> "that the delegates to the Convention * * * shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States * * *. The Constitution shall be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The Constitution of Arizona, Article 3, provides:

> "The powers of the government of the state of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this constitution, such depart-

ments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

The Constitution of Arizona in Article 4, part 1, provides:

Sec. 1. "The legislative authority of the state shall be vested in a legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."

Sec. 3. "* * * the legislature, or five per centum of the qualified electors, may order the submission to the people at the polls of any measure, or item, section, or part of any measure, enacted by the legislature, except laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the state government and state institutions; Provided, that no such emergency measure shall be considered passed by the legislature unless it shall state in a separate section why it is necessary that it shall become immediately operative, and shall be approved by the affirmative votes of two-thirds of the members elected to each house of the legislature, taken by roll call of ayes and nays, and also approved by the governor; and should such measure be vetoed by the governor, it shall not become a law unless it shall be approved by the votes of three-fourths of the members elected to each house of the legislature, taken by roll call of ayes and nays."

Sec. 4. "All petitions submitted under the power of the initiative shall be known as Initiative Petitions, and shall be filed with the secretary of state not less than four months preceding the date of the election at which the measures so proposed are to be voted upon. All

petitions submitted under the power of the referendum shall be known as Referendum Petitions, and shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislature, which shall have passed the measure to which the referendum is applied. The filing of a referendum petition against any item, section, or part of any measure shall not prevent the remainder of such measure from becoming operative."

Sec. 5. "* * * any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the governor, and not otherwise."

Sec. 9. "Every * * * referendum petition shall be addressed to the secretary of state in the case of petitions * * * on state measures * * *; and shall contain the declaration of each petitioner, for himself, that he is a qualified elector of the state, his post-office address, the street and number, if any, of his residence, and the date on which he signed such petition. Each sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people, and every sheet of every such petition containing signatures shall be verified by the affidavit of the person who circulated said sheet or petition, setting forth that each of the names on said sheet was signed in the presence of the affiant and that in the belief of the affiant each signer was a qualified elector of the state, * * *."

The Constitution of the United States in Article 4, Section 4, provides:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence."

It is provided in the 14th Amendment to the Constitution of the United States:

> "Sec. 1. "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The duties of the secretary of state are enumerated in Sec. 4-201, Arizona Code, 1939. It is deemed unnecessary to quote the enumerations and we content ourselves by the assertion that he is made a mere ministerial officer. We think this statement will not be challenged.

The Arizona law makes it the duty of the Secretary of State to receive and file referendum petitions. Sec. 60-105, Arizona Code, 1939, provides:

> "If the secretary of state shall refuse to accept and file any petition for the initiative or for the referendum or proposal for a constitutional amendment which has been presented within the time prescribed, any citizen may apply, within ten (10) days after such refusal, to the superior court for a writ of mandamus to compel him to do so. If the court find that such petition is legally sufficient, the secretary shall then file it, with a certified copy of the judgment attached thereto, as of the date on which it was originally offered for filing in his office; if any petition filed is not legally sufficient, the court may enjoin the secretary or other officers from certifying or printing on the official ballot for the ensuing election the measure proposed or referred. Such actions shall be advanced on the docket and heard and decided by the court as quickly as possible. Either party may appeal to the Supreme Court within ten (10) days after judgment. The superior court of Maricopa county shall have jurisdiction in all measures to be submitted to the electors of the state at large; in cases of local and special measures, the

> superior court of the county, or of one of the counties in which such measures are to be voted upon, shall have jurisdiction."

That legally sufficient referendum petitions were timely presented to the secretary of state for filing appears from the opinion of the court below:

> "Within the time provided by the Constitution for the filing of referendum petitions, there were filed with the secretary of state petitions signed by the requisite number of qualified electors." (Tr. 43, Opinion.)

When referendum petitions were presented to the secretary of state, the only duty placed upon him was to determine if the petitions were legally sufficient. He had no right to do more, or less. Instead, however, of performing his plain ministerial duty, he arrogated to himself the power and authority to decide that the act of the legislature in question was not one that could be referred to a vote of the people by the use of the referendum.

On September 18, 1914 the Supreme Court of Arizona in the case of *State* v. *Osborn*, 16 Ariz. 247, 143 P. 117, declared the meaning of the phrase, "legally sufficient", found in Sec. 60-105, Arizona Code, 1939, quoted above, in the following language:

> "We conclude * * * that the words 'legally sufficient' as used in paragraph 3327, R. S. 1913, mean that petitions which conform with the requirements of law as to form and signature."

Paragraph 3327, R. S. 1913, is now Sec. 60-105, Arizona Code 1939, without any material change.

Notwithstanding, the secretary of state assumed the power and authority to declare the meaning of Article 4, part 1, section 3 of the Arizona Constitution to be directly opposite of the meaning declared by the Supreme Court

of Arizona in the case of *Warner* v. *White*, 39 Ariz. 203, 4 P. 2d, 1000, decided October 28, 1931. He thus forced petitioner, or any other interested citizen, to file the action authorized by Sec. 60-105, Arizona Code 1939, above quoted.

The only action authorized was one to compel him to file the referendum petitions and the only jurisdiction and power of the court was to determine if the petitions were "legally sufficient" and, if found legally sufficient, to require that they be filed.

The trial court required the filing of the referendum petitions because they were legally sufficient. The Supreme Court went outside of and beyond the issues in the case and assumed jurisdiction that no court possesses. Surely it is established beyond legitimate argument that the courts are without jurisdiction to stop legislative bodies from legislating and that jurisdiction of the court attaches only after legislation, not before legislation, and not during the process of legislation. It was on September 18, 1914, at the threshold of statehood, that the Supreme Court of Arizona in a very clear and well-considered opinion in the case of *State* v. *Osborn, supra* so decided. The principle is clearly stated in the case of *Commonwealth of Massachusetts* v. *Melon,* decided June 4, 1923, by this Court, 262 U. S. 447, 67 L. Ed. 1078.

When the courts assume jurisdiction in advance of a law being finally enacted by the legislative department of the government of the state, the republican form of government is destroyed. A construction of a state law, or the provisions of a state constitution, ascribing to them a meaning which renders both the statute and constitutional provision repugnant to the Constitution of the United States and the Enabling Act renders both void.

We recognize that the Supreme Court of Arizona had the jurisdiction and power to reverse its former decision in

the case of *Warner* v. *White, supra,* and to declare the meaning of a constitutional provision to be directly opposite to its earlier declared meaning in said case. This, however, is not the question. The meaning ascribed to the constitutional provision in the case in the court below renders it repugmant to the Constitution of the United States and the Enabling Act, whereas the earlier meaning ascribed to the same language created no repugnacy. Being bound by the last declaration of the meaning of this provision of the Arizona Constitution, we have the court below abridging the privileges of petitioner and the people of Arizona of using their reserved power, at their option, at the polls, to approve or reject an act of the Arizona legislature. We also have the court below, by its opinion, depriving petitioner and all taxpayers of Arizona of their property without due process of law by subjecting their property to taxation under the act in question, which was never finally passed by the legislative department of the government of Arizona. If the people, by the use of the referendum, should refer a law that could not constitutionally be referred, the courts would have jurisdiction to say so after the people had acted, not before they acted and not while they were in the process of acting. It might be that the people would have approved the act of the legislature, and if the people did approve it, then there would be no question for the court to decide.

The assumption by the court of jurisdiction, power and authority to determine in advance of action by the people under their reserved power, by the use of the referendum, that an act of the legislature is one that might not be referred is tantamount to the assumption of the power of life and death over every measure. Such assumed power would limit the right of the people to refer only valid laws. Such assumed power would limit the right of the people

to refer only laws which the court of last resort had already declared to be valid. In other words, every initiated or referred measure, prior to its being voted on by the people, could be attacked in the courts as to its constitutionality or validity. Under the theory of the lower court in this case, the court would pass upon such constitutionality or validity before the legislative processes had been completed. The very statement of this proposition shows the unsoundness of the decision of the court below.

The effect of the decision is to say not only that the courts may do this, but that a mere ministerial officer may disregard the decisions of the court of last resort and do so.

What we have just said was said in other language in the opinion of the court in *State* v. *Osborn, supra,* which we quote:

> "The government of the state is divided into three separate departments, the legislative, the executive, and judicial, and it is provided by the Constitution (article 3) that:
>
> 'Such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.'
>
> "In Allen v. State, 14 Ariz. 458, 130 Pac. 1114, 44 L. R. A. (N. S.) 468, we said:
>
> 'The people did not commit to the Legislature the whole lawmaking power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes. In this state the Legislature and the people constitute the lawmaking power.'
>
> "The appellant concedes that the courts are powerless to restrain a member of the Legislature from intro-

ducing any measure, valid or invalid, for the reason that the courts cannot interfere with the action of the legislative department. What legal warrant has a court to enjoin the Secretary of State from certifying a measure whether valid or invalid? Is not the initiative petition also a step in the process of legislation? For the Secretary of State, or the courts, to assume in advance the power and right to decide whether the proposed measure was invalid would be tantamount to claiming the power of life and death over every initiated measure by the people. It would limit the right of the people to propose only valid laws, whereas the other lawmaking body, the Legislature, would go untrammeled as to the legal soundness of its measures. Such differentiation of powers is expressly prohibited by section 14, article 22, Constitution, which says:

'Any law which may be enacted by the Legislature under this constitution may be enacted by the people under the initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people.'

"This certainly means that the power of the people to legislate is as great as the power of the Legislature to legislate, and for the courts to assume a supervision of one of the lawmaking bodies, and require that measures proposed by it must first receive judicial sanction before action by that body, while the other may proceed without let or hindrance, is not in accordance with the letter or spirit of the Constitution."

## VI

## Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that substantial justice shall be done to the people of Arizona, as well as to these parties, and that

to such an end a Writ of Certiorari should be granted, and that this Court should review the decision of the Supreme Court of Arizona and finally reverse it.

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